No. 2932

United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER B. MITCHELL,

Appellant,

vs.

THE LELAND COMPANY, a Corporation, FRANK LINN and THEODORE LELAND,

Appellees.

Petition of Appellant for Rehearing

Upon Appeal from the United States District Court for the District of Montana.

WALTER B. MITCHELL,
Attorney for Plaintiff in Error.
624 Rookery Bldg., Spokane, Wash.

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Upon Appeal from the United States District Court for the District of Montana.

Comes now the above mentioned plaintiff in error and petitions this honorable court for a rehearing of the above-entitled cause in this court. Said petition is based upon the record and files in this cause and the argument of plaintiff in error heretofore and herein presented.

W. B. MITCHELL,

Attorney for Plaintiff in Error.

ARGUMENT.

I approach the subject of this petition with a great deal of hesitancy, knowing as I do, the disinclination of the courts to grant petitions for rehearing of causes after arguments have once been fully presented, and I would not present this petition, did I not believe that it had exceptional merit and I was not fully convinced that the court has inadvertently committed a grave error in affirming the judgment of the lower court.

In this petition I will not discuss whether a certificate of stock in a foreign corporation is personal property and subject to levy of execution and sale under the laws of the State of Washington, but will take the opinion of this court, to-wit:

> "We incline to the view that corporate stock is personal property within the intendment of the Washington Statutes on execution and attachment, and is subject to levy and sale, if regularly and properly made and executed. This means that the certificate of stock must be physically within the state, and the levy and sale made in pursuance of the provisions of the local statutes."

> "When the writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows:

> 4. Property shall be levied on in like manner and with like effect as similar property is attached."

Rem. & Bal., Code of Wash., Sec. 578, Sub. 4.

"The sheriff to whom the writ is directed and delivered must execute the same without delay, as follows:

2. Personal property capable of manual delivery shall be attached by taking into custody."

Rem. & Bal., Code of Wash., Sec. 659, Sub. 2:

"The sheriff must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after receipt, with a certificate of his proceedings indorsed thereon or attached thereto. Etc."

Rem. & Bal., Code of Wash., Sec. 676.

"All sales of property under execution,***, shall be made by auction between nine o'clock in the morning and four o'clock in the afternoon. * * * When the sale is of personal property capable of manual delivery, and not in possession of a third person***, it shall be within view of those who attend the sale, ***."

Rem. & Bal., Code of Wash., Sec. 583.

"When the purchaser of any personal property capable of manual delivery, and not in the possession of a third person,**, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired, shall give him a bill of sale containing an acknowledgement of the payment.**"

Rem. & Bal., Code of Wash., Sec. 586.

The Washington Court of record issued an execution commanding the sheriff as follows:

"Therefore, in the name of the State of Washington, you are hereby commanded to levy upon, seize into execution the personal property of the said S O. Leland and Amelia Leland, his wife, in your county, ***, and make return of this writ within sixty days from the date hereof." (See Transcript of record herein, page 50).

"I, Geo. E. Stone, Sheriff of Spokane County, State of Washington, do hereby certify that the annexed execution came into my hands on the 1st day of May, A. D. 1913, and by virtue of the same I did, on the 1st day of May, A. D. 1913, levy upon the personal property hereinafter described as follows, to-wit: Certificate No. 1, for fifty (50) shares of the capital stock of the Leland Company, a corporation, of the State of Montana, and that I duly noticed said property, according to law, to be sold by me, at the east door, of the court house, in the City of Spokane, in said County and State, on the 12th day of May, A. D. 1913, at Ten o'clock in the forenoon of said day.******** I attended at the time and place fixed for said sale, and exposed the said property for sale by offering it at public auction, according to law, to the highest bidder, for cash in hand,****** and I have given said purchaser a certificate of sale." (See Transcript of record herein, pp. 45-46).

"It is not the rule that a sale of real property is void merely because the sheriff failed to return that he had been unable to find sufficient personalty to satisfy the writ before levying upon the real estate of the judgement debtor, even when the statute expressly provides, which ours does not, that the sheriff shall first levy upon the debtor's personal property. In a collateral action to set

aside the sale, it will be presumed that the officer performed his duty in this respect."

Withworth vs. McKee, 32 Wash., 83 (93), 72 Pac., 1046.

"A return that a sheriff had, "Levied" the writ on certain personal property was sufficient."

Baldwin vs. Conger, 17 Miss., p. 516.

"This court, speaking through Hon. William W. Morrow, Circuit Judge, said: "It is a general principle to presume that public officers act correctly, in accordance with the law and their instructions, until the contrary appears. Ross vs. Reed, 1 Wheat, 482, 484, 4 L. Ed., 141; Gonzales vs. Ross, 120, U. S., 605, 622, 7 Supt. Ct., 705, 30 L. Ed. 801. In the present case there is nothing stated in return, nor is there any fact before the court, tending to show that the marshall failed in any particular to do his duty in serving the attachment, or that his official acts were in any respect irregular. The presumtion therefore arises that the writ of attachment was served in accordance with the requirements of the statute, and that writ was valid.

Griffin vs. American Gold Min. Co., 136, Fed., Fed., 69, at 73.

In the opinion rendered by this court herein it recites:

"The return declares that he levied upon it. But this is only a conclusion. It should have stated the manner of levy. Mitchell says that the certificate was delivered to him at the sale, as he bid it

> in for Coolin. As to whether it was delivered to him by the sheriff there is only a bare inferance."

But under the above return of the sheriff, he positively says that he levied upon the personal property to-wit: the certificate in question herein and that he exposed the said property for sale by offering it at public auction, according to law, that is he had said certificate of stock in question in his hands and was within view of the bidders at said sale and he delivered it to Mitchell, and therefore under the facts and the law as cited on this point the said levy and sale was regular in every way and therefore the title to said certificate passed to Coolin by virtue of said sale and to the plaintiff herein by virtue of assignment of same from Coolin, for since the said judgment roll of the Superior Court of the State of Washington was introduced in evidence without objection on the part of the defendant and no evidence was introduced by said defendant to contradict the fact recited in the sheriff's return, or to the testimony of Mitchell that he received the certificate at the sale, then the law presumes that everything was regular and that it was the sheriff that gave the certificate to Mitchell for Coolin, when the certificate of sale was given him.

In the opinion of this court it says:

> "It is unnecessary to pursue the discussion further. It is manifest, along with the manifold irregularities attending the pretended levy and sale, that the procedure adopted was devised for divesting Leland of the title to his stock, after

> Murphy had, by violence and trespass and without right, snatched the possession of it from him, and must be considered and held to be a part of a concerted attempt to despoil Leland of property rightfully his. Parties must not expect relief in equity unless they come into court with clean hands." (Page 7.)

This court in rendering the above part of its opinion, has inadvertently overlooked the fact that there was no evidence introduced in the instant case to contradict the return of the sheriff on the sale of the certificate in question herein, and therefore has misapplied the law as shown heretofore, to-wit: That in such cases the law presumes that the sheriff acted in accordance with the law and his instructions, and has further inadvertently overlooked the return itself as shown on pages 45-46 of transcript, where the sheriff says that he exposed said certificate and offered it for sale etc. Therefore this court is in error when it says there was manifold irregularities attending said sale and levy, for as a matter of fact there is none. The court had further inadvertently overlooked the fact that the plaintiff has raised a constitutional question in the instant case, to-wit:

> "The Court erred in not giving full faith and credit to the proceedings in Spokane, Wash., being the records of a court of record of the State of Washington, in violation of the constitution of the United States, Article 4, Sec. 1." (See Transcript herein, page 69.)

S. O. Leland entered into a contract with E. C. Murphy on the blank date of May, 1912, for the return of the certificate in question herein, (see Transcript of

record herein page 53) and this contract was assigned to John E. Murphy by E. C. Murphy on the 20th day of June 1913, (see Transcript of record herein, p. 39), said John E. Murphy brought suit upon this contract on the 8th day of March, 1913, and in the complaint said John E. Murphy alleged as follows:

> "That the above contract was duly assigned to the plaintiff on the 20th day of June, 1912, and that the contract was carried out except the payment of $100.00, which payment is long past due and the defendants has persistently refused to pay said amount as agreed or at all." (See Transcript of record herein, p. 39.)

The said Lelands never denied this allegation but allowed this action to go by default and said default was entered against them on the 8th day of April, 1913, and judgment also on same day, (see Transcript of record herein, pp. 43-44), and therefore under and by virtue of this judgment of a court of record of the State of Washington it is determined that said S. O. Leland never paid this money and refused to pay the money upon the frequent demands of said John E. Murphy and this judgment is a final adjudication of the said question. Said judgment not having been reversed by the courts of Washington and the time in which said appeal could be taken having elapsed.

> "The whole theory of the doctrin of **res judicata** is that a question once decided by a court of competent jurisdiction having jurisdiction of the parties is finally decided, until reversed upon appeal

or otherwise set aside in some lawful way. (Citing cases): Harding vs. Harding, 198 U. S. 317.

"It is the settled law in this state in an action between the same parties a judgment therein is res judicata as to all points in issue and also as to all points that might have been raised and adjudicated in such action."

Loeper vs. Loeper, 81 Wash., 454. 142, Pac. 1138.

Hawkins vs. Reber, 81 Wash., 82. 142 Pac. 432.

"No appeal of any kind having been taken from the first judgment or from the order refusing to vacate it, that judgment is res judicata as to the whole controversy touching the large car."

Winton Motor Car Co. vs. Blomberg, 84 Wash., 451. 147 Pac. 21.

"Judgment in an action of replevin, by a court of a sister state having jurisdiction of the subject matter and of the person of the only defendant named as vendee in a bill of sale of the property, which determines the title to the property to be in plaintiff, cannot be collaterally attacked by one claiming to have an interest with defendant as one of the vendees, even though the judgment be erroneous."

Fleming vs. Langley, 86 Wash., 346. 150 Pac. 418.

"The courts of one State must give full faith and credit to a judgment rendered by the courts of another state."

Free vs. Western Union Tel. Co., 147 N. W. 1040:

> "As the judgment here relied upon was not a transaction based on any acts mentioned in section 993 of the New York Code, which is the only statute in that state which effects the validity of the judgments based upon gambling transactions it is not void, under the laws of that state, and being entitled under the constitution of the United States to the same faith and credit it would receive in the courts of the State of New York and is not subject to attack in this proceedings."

Carpenter vs Beal Etc., 222 Fed., 453-461.

Roller vs. Murry, 234 U. S., 738.

S. O Leland was allowed to testify over the objection of the plaintiff as to what occured between him and E. C. Murphy in reference to the return of the certificate etc. (See Transcript of record herein, p. 76):

> "That he completed his contract with Murphy, deeded certain reality to Murphy and delivered Murphy a check for $100.00; Thereupon Murphy delivered the share certificate in question to him without any written assignment; immediately, however, Murphy demanded other money from me and upon my refusing to pay, Murphy wrested the share certificate from my hands, and thereafter on my repeated demand for it, he assured me that it was lost." ((See Transcript of record herein, p. 77).

But further on cross examination S. O. Leland said:

> "He was personally served with process in the City of Spokane, Wash., and that he was then a resident of Spokane, Wash., and allowed the said suit to go by default and made no attempt to

> fight it at all; and before judgment was rendered Walter B. Mitchell, plaintiff herein, tendered the certificate in question to him and demanded the money called for in said contract and he refused to pay it then; and later, about the middle of May, he moved to California and has resided there since." (See Transcript of record herein, p. 77).

W. B. Mitchell testified as follows:

> "That the date of the tender of said certificate to S. O. Leland and demand for the payment was prior to taking default in said proceedings, which according to the record of the cause was on the 8th day of April, 1913, and that at that time S. O. Leland made no claim of ever offering Murphy a check, and he refusing it or mentioned anything that would create a suspicion of anything of that nature." (See Transcript of record herein, pp. 77-78).

It will be well then to observe the testimony of S. O. Leland, and first we find that he does not give any date for this purported conversation and doings of E. C. Murphy and as a matter of fact if it did occur after the assignment it was not admissable against John E. Murphy or A. Coolin or plaintiff herein, and if it occurred before the assignment then it was a matter that should have been defended in the suit in the Washington courts for the court found there that S. O. Leland failed and refused to pay this money and by reason of that failure gave judgment against him on or about the 8th of April, 1913, and up to February 1st 1916, the day of the trial of this suit in Helena, this man, S. O. Leland, never took any steps to set aside this judgment in any way manner or form, but stood by and allowed the court to ren-

der judgment against him and the sheriff to sell the certificate to satisfy the judgment and three days after the sale he left Spokane, Washington, and went to California, (see Transcript of record herein, p. 77) and has never since tried to have said judgment or sale reversed or set aside in the courts of Washington. He attempts to say to this court in one breath that E. C. Murphy assured him the stock was lost, but on cross examination the next breath of this man was that the stock certificate was tendered to him by Mitchell, who was attorney for John E. Murphy on the 8th day of April, 1913, and the money demanded and that he refused to pay the same and take the certificate, and by this admission it is found that this man, S. O. Leland, knew this certificate was not lost and the fact that he did not deny the allegation of John E. Murphy, to-wit: that S. O. Leland had persistently refused to pay this money as agreed or at all, would be conclusive of the fact that S. O. Leland knew from the 20th of June, 1912, that John E. Murphy had said stock certificate and the same was not lost, and since the date of the contract between S. O. Leland and E. C. Murphy was blank, there is no evidence introduced in the instant case to show the exact date of same and it was the duty of S. O. Leland to at least inform the said John E. Murphy of any defenses that he had to the payment of said money and also his duty to appear and set forth his defenses if he had any to the suit in the Washington courts and his failure to do so was fatal to his contention now that he

had a defenses of any kind or nature and the courts of Washington could not entertain any such claim at this time.

On the other hand the fact that S. O. Leland attempted to get a new certificate issued by the Leland Company on the 1st day of May, 1913, (see Transcript of record herein, p. 17) at a time when both he and the said corporation knew that said certificate of stock was not lost, (see Transcript of record herein, p. 28) and that Theodore Leland received the letter of May 29, 1913, (see Transcript of record herein, pp. 24, 25, 26 and 27) and that Theodore Leland informed Mitchell's agent at Gardner that there was a new certificate issued to S. O. Leland on the theory that S. O. Leland made an affidavit that the old one was lost, (see Transcript of record herein, pp. 34-35), shows that S. O. Leland made a false affidavit, as he knew at the time that it was not lost and that the corporation was lending its aid to try and defeat the said John E. Murphy out of the payment of the judgment by converting the old certificate and if there was any fraud practice in this transaction from start to finish, it was the fraud of S. O. Leland, and it does not seem possible that this court will allow S. O. Leland to come into court of equity and testify falsely, as shown herein to matters which are not even admissable in evidence in the instant case and then assume fraud upon the part of the plaintiff herein by reason of that false testimony

> "It is elementary that one asserting fraud as a ground of action must, in order to maintain the action, prove the fraud by clear and convincing evidence."

Ulbright vs. Mulcahy, 78 Wash., 9, 138 Pac., 314.

And there is no case that I have been able to find where the court is held to have the right to assume fraud unless so shown by the testimony. On the other hand in the answer of the appellee to the amended complaint herein, (see Transcript of record herein, p. 17), it was the contention of this defendant that there was a new certificate issued in place of the one in question herein, as shown on page 29 of Transcript herein, on or about May 1st, 1913, after it had notice as shown on page 28 of Transcript herein that the old certificate was in the hands of others than S. O. Leland and in the face of the clause in said certificate that same had to be surrendered before a new one was issued and that defense was abandoned for the reason that there was no such transaction and no new certificate ever issued and therefore this defense was a false defense and naturally this circumstance shows that the defendant did not come into court with clean hands from the start and if it would try one false move, then the attempt to obtain the same result by placing S. O. Leland on the stand to testify as he did can be construed in no other light than another attempt to cast some suspicion on the plaintiff of fraud and should not be tolerated by a court of equity.

S. O. Leland did not even leave this affidavit with said corporation but kept the same in his own possession in order that it could not be produced against him in case of his apprehension for making false affidavits to obstruct due administration of the laws of the State of Washington, and even left Washington and went to California.

> "According to their books new stock was issued in place of this certificate for the reason that same was lost or destroyed and affidavit to that effect is in possession of S. O. Leland, who is now in San Francisco, Calif." (Trans. p. 35).

In making this affidavit S O Leland was not truthfully reciting what he believed the facts to be, but on the contrary was citing that the certificate was lost or destroyed on May 1st, 1913, when he knew, and was forced to admit upon cross examination herein that said certificate was in the hands of John E Murphy and was not lost.

Any testimony of S. O. Leland then must be carefully examined as he is shown to be deliberately trying to avoid the payment of his just obligations by fraudulent means. Now, then, he says "Murphy delivered the share certificate to him without any written transfer thereof, and he delivered to Murphy a check for $100.00. Immediately, however, Murphy demanded other money from me, and upon my refusal to pay, Murphy wrested the share certificate from my hands." Suppose then, that Murphy when he inspected the check refused to ac-

cept the same, but demanded money in place of same, or in other words other money in place of the check and Leland refused to give money and Murphy refused to transfer the certificate and took the certificate back, then Murphy was perfectly justified in taking the certificate back under the circumstances, **if it did occur.**

A similar state of facts was presented to the Supreme Court of Idaho, to-wit:

> One Fales entered into a contract for the conveyance of certain lots upon the payment of certain money, and then contracted with the Weeter Lumber Co. to furnish building material and upon the failure of Fales to pay said account the Lumber Co brought suit and recovered judgment and foreclosed its lien against the property. Thereafter Fales and wife brought suit in equity to set aside the judgment on the grounds that Elizabeth Fales was not a party to the first action and that it was community property and therefore the trial court of the first action acquired no jurisdiction. It was held in that case that Elizabeth Fales being present at the trial and testifying for her husband and knowing that the lien was filed and was being foreclosed and not making any objection then, that she could not now make objection and said suit in equity was dismissed.
>
> Fales vs. Weeter Lumber Co., Ltd., 26 Idaho, 367, 143 Pac., 526

In the instant case S. O. Leland did not make any defense to the suit in Washington, and it is clear to be seen that if he was to have tried to set aside the judgment in Washington, that he would have failed and

therefore under the full faith and credit due the Washington Court of records, his testimony was clearly inadmissable herein and cannot be made the foundation of setting aside the Washington judgment and proceedings in a collateral attack and the introduction of said evidence was an error of the trial court and the consideration of same by this court was an error of this court. As the Washington judgment cannot be attacked in this court and any relief obtained in the U. S. Circuit Court of Montana, **as the place to attack a judgment or sale is in the court wherein the same is tried and unless done there it is conclusive of the matters therein demined.**

The record in the instant case shows that S. O. Leland has persistently tried to avoid the payment of the obligations of the contract with E. C. Murphy and which was assigned to John E. Murphy and it further shows that said John E. Murphy has acted in good faith at all times and has given the said S. O. Leland every opportunity that is required as a matter of law and has even went further and gave said S. O. Leland timely notice of the dangers that he was in providing that said payments were not made and said S. O. Leland has ignored said warning and even defied the courts of the State of Washington and is now attempting to use this court to avoid his just debts under the color of fraud which he claims that was practiced upon him, not by the plaintiff or John E. Murphy, but by E. C. Murphy after he has stood by and saw E. C. Murphy assign said

contract and suit brought to inforce the same and sheriff sell said certificate to satisfy the judgment without giving notice of his claim, and does not attempt to offer the payment of his just obligation and he certainly is not in a court of equity and the corporation has no claim to equity in this proceedings. If the rule that one must come into court of equity with clean hands applies to this case at all, this court has inadvertently applied it to the wrong party for it must apply if at all to the appellee herein.

I desire to say in conclusion that I know petitions for rehearing are not favored, but I realize, and I can say freely that this Court in rendering its opinion in this case must have overlooked the matter presented in this petition inadvertently and does not wish to intentionly create a hardship upon any litigant to force him to seek a correction of this matter in the higher Court, if such inadvertence can be plainly pointed out to it, as I believe has been in this argument, and I earnestly urge in the interest of justice to both plaintiff and defendant that this petition for rehearing be granted and reargruments be had and reconsideration of the questions suggested in this petition.

Respectfully submitted,

W. B. MITCHELL,

Attorney for Plaintiff in Error.

The undersigned, attorney for Plaintiff in Error, hereby certifies that in his opinion and judgment the foregoing petition for rehearing is well founded in law, and allege that it is not interposed for delay.

W. B. MITCHELL,

Attorney for Plaintiff in Error.